



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 784

CARLTON R. BENTON, ADMINISTRATOR OF THE ESTATE
OF WILLIAM DEVER, DECEASED,

Petitioner,

vs.

ST. LOUIS-SAN FRANCISCO RAILROAD COMPANY,
A CORPORATION,

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI

Opinion of the Court

I

The opinion of the Supreme Court of Missouri in the case of *Carlton R. Benton, Administrator of the Estate of William L. Dever, Deceased, Petitioner, v. St. Louis-San Francisco Railroad Company*, a Corporation, respondent, is not yet officially reported but was rendered on July 3, 1944, and appears at 182 S. W. 2d 61. Petition for rehearing or in the alternative to transfer to the court *en banc* was filed July 18, 1944, and denied September 5, 1944 (R. 338) without opinion.

II

Statement as to Jurisdiction

The judgment of the Supreme Court of Missouri determined right claimed by petitioner under the Federal Employers' Liability Act (April 22, 1908, c. 149, Sec. 1, 35 Stat. 65, 45 U. S. C. A. Sec. 51). The jurisdiction of this Court is based upon Section 237 (b) of the Judicial Code as amended by the Act of February 13, 1925, in Chapter 229, Sec. 1, 43 Stat. 937 (U. S. C. A. Title 28, Sec. 344, and particularly Section 344 (b) thereof).

A full statement of the statutes and decisions relied upon as the basis of jurisdiction herein and the nature of the case are fully set out under the heading "Basis of Jurisdiction" in the petition for the Writ of Certiorari herein and will not be repeated here.

The substantiality of the questions involved also appears under that heading in the petition for the Writ of Certiorari herein and will not be repeated at this point.

III

Statement of the Case

Inasmuch as petitioner is relying upon the *res ipsa loquitur* doctrine he was required to develop the evidence to the fullest extent of which the case in its nature was susceptible which requires a more lengthy statement of the case than would ordinarily be necessary. We shall make it as brief as possible consistent with imparting to the court a comprehensive resume of the facts.

William L. Dever was injured on July 14, 1932, while employed by appellant at Fort Scott, Kansas, as a switchman. He had worked for the appellant in such capacity for the past 18 years and regularly performed his duties

(R. 17). He had gone on duty at midnight and was injured about 2:30 a. m. The members of his crew were George Toner, foreman, J. L. Stiles, fieldman, Charles E. Johnson, engineer, Wilbur Kitchen, fireman, and respondent's intestate, Dever. It was dark, the only illumination being a street light about 100 to 150 feet south of where Dever was injured. There was an electric headlight on the engine and Dever carried his lantern and at the time he was injured, he was riding on the east side of the back footboard of the engine (R. 18). The engine was headed north. It was moving south on what is known as the Brockett spur close to the Drake spur. Dever was standing on the footboard which is about 10 inches wide, 2 inches thick and made of hard wood, oak. It extended or had an overhang of about 18 to 24 inches over the rail (R. 19). The footboard was about 8 to 12 inches above the rail and there was a toeboard at the back thereof about 4 or 5 inches high made of the same kind of timber. The footboard was about 18 inches from the rear wheels of the tender (R. 20).

The crew had picked up a car on the house track and backed into the Brockett spur (R. 19), and it was necessary to line a switch at Wall Street and back into the Brockett spur over the switch connecting the Drake spur with the Brockett spur. The switch had been there 23 years to Dever's knowledge. The normal position for the switch was to have the switch point lined for the Brockett spur so that cars could pass in front of the Drake spur without entering it (R. 21). Such was the customary position in which the switch was left and the only way that an engine could get out of the Brockett spur was for the switch to the Drake spur to be in such normal position.

The switch was known as a ground throw switch (R. 114) and was operated by a lever with a ball on the end which worked back and forth, east and west. The lever (switch

stand) was located on the east side of the tracks, was fastened to a tie with an iron plate and was connected with the switch point by a rod (R. 115). It operated in such manner that when the lever was thrown to the west, the switch points would direct traffic into the Drake spur, and when it was thrown to the east, the traffic was directed on into the Brockett spur (R. 117). This switch was also known as a ball-throw switch (R. 179). A photograph of this ball-throw switch appears at record 27 (plaintiff's Exhibit 2) and again at record 195 (defendant's Exhibit K), the lever being shown in different positions in the pictures. When the switch was lined to go past the Drake spur on the Brockett spur, the lever would be thrown to the east and cars could move back and forth on the Brockett spur past the Drake spur without interference. The switch points moved the same direction the lever moved, so that when the lever was thrown to the west, the switch points moved to the west, and when thrown to the east, the switch points moved to the east (R. 22). When the lever was thrown to the west, it lay close to the east rail of the tracks, according to Dever, within two or three inches thereof (R. 22); according to Mr. Freeze, track foreman (R. 177), within from two to six inches of the east rail of the track (R. 212). At the time of his injury, Dever was standing on the east end of the footboard and it was his duty to get off at the switch and "line" it after the car for the Drake spur had passed. He was riding the footboard and looking for a place to get off. The usual and customary place for switchmen to get off to throw the switch was just beyond (south) the tie to which the lever was attached. Plaintiff's Exhibit 2 (R. 26, 27), is a fair representation of the *locus in quo* (R. 23, 25). Dever observed the switch points as he approached them and they were properly aligned for the Brockett spur or the movement then being made as shown in plaintiff's Exhibit 2 (R.

26, 27) and the lever (ball) was properly thrown away from the tracks where it would lay about 5 feet therefrom (R. 29). With the switch aligned for the Drake spur, the lever (ball) would be thrown to the west next to the east rail of the track (R. 30). When Dever reached a point opposite the switch and standing on the footboard, with part of his foot against the toeboard, the lever and ball came over from the east and hit him on the right ankle (R. 31), knocking him into the ditch and injuring him (R. 32).

When an engine or car is run through a switch, if the ball goes in any direction, it goes away from the rail and is bound to go toward the east in the movement being made. It would be impossible, if the engine had run through the switch, for the ball to have been thrown toward the engine or track (R. 30). If the switch had been aligned for the Drake spur when the footboard was opposite the same, the ball would have been directly under the footboard and it would have struck under the footboard, because it can't come up and it would not have been possible for it to have hit Dever because the ball would have been laying within three to six inches of the rail and the footboard extended from 20 to 24 inches east of the rail (to be exact, 22 inches), (R. 31) (R. 212).

Dever's usual and customary place for getting off the footboard to throw the switch was just beyond the same. When he was opposite the switch, he saw a flash and something struck the pants of his left leg and come right on through and hit him on the right leg. His right foot was still on the footboard when he got hit. He was just in the act of hanging down to alight as easily as possible when the ball hit his ankle (R. 33). He suffered much pain (R. 32). Dever lay where he had fallen until the crew could get to him and while he was lying there he saw the lever standing up and moving back and forth until the

engine stopped. He observed that the plate which fastened the lever to the tie was sticking up about 45 degrees on the back side. He could see the spikes sticking up from where he lay just a few feet from the switch. He had never observed the switch to operate like that before. He had done nothing to the switch at all that evening and had not been there for possibly a week. The track at the point where Dever was injured is constructed of used rails of different sizes, different heights, the rails are crooked, the gauge is uneven, the switch points are not the same size as the rails with which they connect (R. 33) (See plaintiff's Exhibit 10, R. 238, 241). They were worn and in a loose and sloppy condition. The switch point on the east side had about three-fourths of an inch of play over the stock rail, which allowed the switch point to raise up and down and it would raise up possibly one inch above the rail and might go one inch below the rail. It was very loose. The throw lever was so loose on the rocker arm that it could be raised to an angle of about 45 degrees before it would start to move the switch points. There was lots of play in the connections. The hole in the pilot rod was twice as large as the pin which fastened it to the lever and the same condition existed with reference to the connection between the pilot rod and the connecting or tie rods, which are the rods that connect the two switch points and cause them both to move simultaneously (R. 34-42). The switch points rested on tie plates that are oiled and are sloping so that the switch may be thrown easily back and forth (see plaintiff's Exhibit 10, R. 238, 241). Dever did not have anything to do with any repairs, servicing, upkeep or inspection of the switch. It was located upon defendant's property and the persons who inspected and repaired the switches were appellant's section men.

The lever was about 30 inches long and the metal plate which fastened it to the ties used as a head block was about 12 by 14 inches. The ball was near the end of the lever and the end of the lever extended a little beyond the ball for a hand-hold. The ball was about 4 or 5 inches in diameter and weighed about 35 pounds (R. 207). There was no latch, dog or other mechanism to hold the lever down (R. 35, 42). When the lever was thrown from east to west or *vice versa*, the switch points would move $4\frac{1}{2}$ to 5 inches. The switch point on the east side was made out of heavier steel than the rail to which it was fastened (see plaintiff's Exhibit 10, R. 241) and was from a quarter to $\frac{1}{2}$ inch higher than the rails which adjoined it on the north, the effect of which was that the switch point would jump when the wheel would hit it (R. 36). Plaintiff's Exhibit 3 is identified as a very good model of track, switch, and switch lever at the place where Dever was injured (R. 39) and is a fair representation of what it looks like and the way it operated at the time he was injured. The purpose of the ball on the end of the lever was to counteract the weight of the engine (R. 40). As Dever was approaching the switch, he saw the track, switch and the ground surrounding. The switch was properly aligned for the movement being made.

After he got out of the hospital, he went to the scene of the accident (R. 41) which was about 8 weeks from the time he got hurt (R. 42).

Ordinarily in operating the switch, it would remain in the position in which it was placed and Dever had no knowledge of the causes which operated to bring about the throwing of the lever toward him at the time he was injured (R. 43). The switch was about 75 feet from the frog (R. 48). Dever was working on the extra board at the time he was injured on account of reduced force. Previously,

defendant had worked 8 switching crews, but at the time he was injured, they were only working 3 and Dever averaged working about half time (R. 51, 52). Dever had brought engines and cars over the switch in question a great many times, mostly at night, as he never did have a regular daylight job (R. 53). In order to get to the Drake commission spur it was necessary to proceed south on the Brockett spur over the switch in question far enough that the car which was being pulled ahead of the engine would clear the switch points. The intention was to throw the switch by throwing the lever toward the rail and head in on the Drake spur, leaving the car and backing out past the switch, throw the switch and proceed about the rest of their business. Dever could see both switch points as he approached the switch, but could not see the ball on the switch. It was no part of his duty to know whether or not the switch was lined (R. 55), but if he had seen it was not properly lined, he would not have permitted the engine to pass through it. If the switch was not properly lined and the engine had gone through, it might have thrown the lever over from the west to the east, or bent the switch point. Something would have to give, because the flange of the wheel would be between the switch point and the west rail and the wheel on the east or left side of the engine would be pressing against the east point and if the switch point was thrown to the east, it would necessarily carry with it an eastern movement of the ball (R. 56). It was Dever's judgment that the switch points were about 8 feet long. He was about 50 or 75 feet north of the points when he observed that they were properly aligned for the movement (R. 57, 58). The switch point to the east was connected to the east rail of the Brockett spur (R. 60) and the switch point on the west was connected with the west rail of the Drake spur (see plaintiff's Exhibit 7, R. 160, 163). The switch points were loosely connected at their north end to the respective rails.

Both the switch points slide back and forth on guide plates easily. The two switch points were connected with a piece of steel at their south end; the two points were connected with a switch (stand) by a bridle rod, which extended from the switch lever to the connecting rods which in turn connected the two switch points at their south end (R. 61). The bottom of the lever was fastened in a steel plate about 12 by 14 by 1 inch and the bridle rod was fastened to the lever at the plate and the lever in turn was fastened to the plate. The center of the steel plate was 34 to 36 inches from the east rail and the lever was about 30 inches long (R. 62). The plate was fastened to what is known as the head-block which was usually a long tie that extended through under the tracks and out a sufficient distance for the lever to be attached, but there was no head block in connection with this switch. They just used ties to take the place of the head-block. Dever had not noticed that the two spikes on the east end of the steel plate were up about three inches before the accident (R. 63). On the night Dever was injured, the switch points and connections were loose and the wheel on the right or west side of the tank would have a tendency to hit the heel of the point toward the west (R. 66) and under such conditions, it would have a tendency to throw the ball back west toward the engine as it hit the switch point. Dever testified that he had previously seen the switch points open and work up and down, but had never seen the lever come over. He had seen the ball raise up and down approximately an inch or two. It was the lever and ball which struck Dever (R. 67). The object which struck him came from the east to the west and could not have struck him going east (R. 68). The accident could have been caused by the wheel hitting the west switch point with the switch plate torn up and loose but Dever did not know whether it was torn up and loose before he was injured or not. The accident happened in a

most unusual manner (R. 69). As the engine approached the switch, Dever saw an opening between the west rail and the switch point and thereby knew that the switch was properly aligned for the movement being made (R. 63), and it was not necessary for him to endeavor to locate the ball in the dark when he knew from the opening between the west rail and the switch point that the switch was properly lined. Consequently, he had no occasion to give the engineer any signals. There was nothing indicating to him that anything was wrong (R. 72).

The width of the tread on car wheels is $4\frac{1}{2}$ to 5 inches. The flange of a car wheel is $1\frac{1}{8}$ to $1\frac{1}{4}$ inches thick. The standard throw between the switch points and the rail is $5\frac{1}{2}$ inches. The standard gauge of a railroad track is 4 feet, $8\frac{1}{2}$ inches. There was no head-block at all for the switch stand, it just being fastened to two ties extending over the ditch, as shown by plaintiff's Exhibit 10 (R. 238, 241). Ordinarily a head block is used which is a solid, continuous piece of timber extending clear through under the tracks, even with the ties. This strengthens the mechanism of the switch, and makes it more rigid (R. 73). If the switch had not been set for the movement they were making at that time and the ball had been caused to move in any direction, it would have been toward the east and not toward the west. If the wheels are on the east switch point and on the west rail of the tracks, it is impossible for the ball to flop over toward the west unless the switch plate was defective, and the switch points open. If the switch is set against the movement, the flange of the wheel pressed against the switch point and would have a tendency to cause the ball to move toward the east, away from the rail, which would be away from Dever. If the switch had been set against the movement and Dever was at a point on the footboard immediately opposite the ball and the

engine was running through the switch, it would have been impossible for the ball to have struck him (R. 74, 75) because it would have come up under the footboard, which it could not clear, as the footboard extended 18 inches over the rail and when the switch was thrown with the ball toward the rail it was so close Dever had often struck his knuckles on the rail in raising the ball and lever to throw the switch (R. 75).

Every member of the train crew appeared and testified at the trial. G. E. Toner, switch foreman (R. 111), Wilbur G. Kitchen, fireman (R. 227), G. L. Stiles, fieldman (R. 247), C. E. Johnson, engineer (R. 262) and in addition thereto, N. T. Freeze, track foreman (R. 177, Paul McCrum, another engineer (R. 277) and G. L. Swearingen, general yardmaster (R. 283), all testified.

Toner testified that the ball and lever were attached to an iron plate which in turn was fastened to one of the ties (R. 115-116), that switch points did not fit up exactly and the spikes in the tie plate were loose that they made a test with the switch thrown against the movement and the lever flopped over when the engine came back (R. 121-122). He had been familiar with the switch stand for 22 years (R. 122). That they found a notch on the bottom of the footboard that looked as though the ball had struck it and if the ball came over from west to east it could hit a man's foot (R. 124). The switch points move about 5 inches when the switch is thrown, which means that the connecting (bridle) rod is fastened about $2\frac{1}{2}$ inches from the center of the bolt that holds the lever to the plate. That the wheels of locomotives, switch engines and tenders become worn from constant use and the flange gets thin so that they have to put them on a lathe and turn them down (R. 126, 127). The track in question was not kept up like main line tracks and never is. He could not tell by looking at them

whether or not they were constructed of old material. The tread of the wheels is about 4 inches and the top of the rails from $2\frac{1}{2}$ to 3 inches wide (R. 127). He never saw a rail changed on that track in his time. He couldn't say whether they were all of the same size or not, even though he had been looking at them for 22 years. The switch points worked back and forth on tie plates extending under them for the distance they moved and that the section men put heavy grease on them. The spikes in the switch plates were loose. He testified that he never examined the switch mechanism (R. 128); that it was not his duty to examine switches; that it was not Dever's duty to examine switches; that the only thing he did was to throw them when they used them; that he did not have anything to do with the inspection, up-keep, maintenance or repair of the switches (R. 129) and neither did Dever (R. 130); that they had run through switches lots and lots of times (R. 153); that the engine men are supposed to know if the switches are properly aligned; that the railroad required Johnson, the engineer, to know whether or not the switch was open or closed, but he never asked him anything about it at the time, nor did he ask Dever (R. 154). In the 22 years he had worked for the defendant, he had never heard of a man standing on the footboard of an engine being injured by a switch lever when a switch was run through; that he saw Dever fall off the footboard; they made tests of the switch because they did not know whether it happened on account of the switch or what caused it (R. 155); that the purpose of the ball was to hold the lever down (R. 157); that when the lever is thrown to the east or west, it ordinarily, usually and customarily remains in that position and that it would be most unusual and extraordinary if it moved when a train was passing over the switch unless it was running through the switch, but if the train was running through the switch, it would

throw the ball away from the tracks; that if the switch lever did not hold the switch points in proper position, they probably would work loose and move in any direction; that the tracks were not straight; that there is a little more motion to a switch engine moving on industrial tracks than on a mainline track (R. 158) and that consequently that will throw one end or the other against one side of the other of the rails of the tracks (R. 158) if there is a little curve, whatever way the curve is (R. 159); that he never noticed anything dangerous about the tracks; that all he ever did was just to throw the switch (R. 166) that the spikes were loose in the plate; that the plate had been there for years (R. 168); that he heard them driving spikes coming back from calling a doctor; that no test was made with the switch properly aligned; that they now have a lock, latch or hook on ground throw switches; that if the switch and points and everything were operating normally, properly and usually, there was no way that the switch lever could have been thrown toward the west (R. 172) and if it did fly over to the west, it would be a most unusual and extraordinary occurrence; that for a time switchmen were not permitted to ride on the footboard in the direction in which the engine was moving (R. 174); that by "running through a switch" is meant passing over a switch that is improperly set for the movement being made (R. 176).

Mr. W. T. Freeze was yard foreman for the defendant at the time Dever was injured and had charge of the yards and the tracks and switches in the yards. He had been there on the position continuously since 1917 and was familiar with the Brockett spur (R. 177) and the Drake spur and was familiar with the switch that controlled the movements of engines and cars in and to the Drake Commission switch track (R. 178). It was part of his regular duty to make regular inspections of this switch. This switch was called

a ball throw switch (R. 179) and when the switch was set for an engine or cars to go south on the Brockett spur, the west point would be away from the west rail and the east point would be next to the east rail and the ball of the switch would be over to the east. The track is not first class; it is fair back track (R. 180). He inspected the switch about 2 or 3 times a week and he had inspected the switch at 3:00 p. m. the evening before Dever was injured by looking it over to see if it was O. K. and throwing the switch and found it in "pretty good shape" (R. 181-184). The points slide on split plates the points are supposed to be higher than the lead rails, otherwise they will cut the lead rail (R. 182) and catch and turn the lead rail over. The plate was about 10 inches square (R. 183). The plate was securely fastened when he inspected it. No spikes were pulled up. The rod and the switch points appeared to be all right (R. 184) and he inspected the track in the vicinity of the switch and there was nothing wrong with the track or rails (R. 185). Some of the rails with which the Brockett spur was constructed were worn more than others, and on the night of the accident, he was called to the scene by Debobbin, the yard master (R. 186). He testified that he found the spikes on the front side of the switch stand pulled up about $1\frac{1}{2}$ inches and the back side about $\frac{1}{2}$ inch (by front side he means the one next to the rail). They were not pulled up at 3:00 p. m. the preceding afternoon; the connecting rods and the head rod were bent. When the ball was thrown toward the rail the west point did not touch the west rail by about 1 inch. The switch had fit snugly both ways that afternoon when he examined it (R. 188-189). When a switch had been run through, it will either pull the spikes or bend the rods (R. 190). The next morning they made tests by running an engine through the switch with the ball thrown toward the west, and it throwed

the ball over to the east. The switch points are 15 feet long and the switch stand and switch ball are right at the south end of the points. The engine was backed through the points when they made their test. The wheels of the tender were 3 feet 8 inches from where they set on the rail to the back end of the footboard (R. 191). Defendant's Exhibit K (R. 193, 195) is a picture of the engine going through the switch when it was thrown the wrong way for the movement, and when they made their test, the ball began to raise before the footboard got even with it (R. 192). The picture was taken at the time the tests were being made (R. 193). When the engine went through the switch, the ball raised up and was thrown over to the east and after the engine had passed through the switch, the wrong way for the movement, the ball was over to the east. Witness identified plaintiff's Exhibit 2 (R. 26-27), as being a fair representation of the way the switch and ball looked after the engine had passed on to the south (R. 199). The switch stand had been in use for more than 30 years to witness' knowledge. He testified he was about 10 minutes inspecting and manipulating it the afternoon before Dever was injured (R. 203). The holes and bolts in the switch connections wear and the switch was loose (R. 204). There was 1½ inches play in the lever before it would move the points which move 5½ inches for a full throw (R. 206). The switch in question is the only ground throw stand the witness ever found with the spikes pulled up that way in his 34 years' experience (R. 208). He considered it unusual and he had seen hundreds of switches that had been run through. The head block was decayed. Two or three days thereafter they put up another switch stand. There was no lock or latch on the switch lever and the weight of the ball was all that was supposed to hold it down (R. 209). If the switch was loose the points would move any way. At

the time Dever was injured, the defendant kept two crews working all of the time, one on the north and one on the south end (R. 210). When the ball was thrown toward the rail it would lay within from 2 to 6 inches thereof and the overhang of the footboard was 22 inches (R. 212-213). It would be unusual and extraordinary for a switch lever to flop over and hit a man on the footboard (R. 213). When tests were made the following day the plate was not pulled up by running through switch (R. 214).

Wilbur G. Kitchen testified that he was the fireman on the switch engine at the time Dever was injured (R. 227). When a switch is properly set an engine goes over it and when improperly set it goes through it (R. 231, 278). When they made tests they backed through the switch set against the movement and the lever just raised up and went over to the east (R. 232, 251, 279). There is a rule that the engineer is bound to know before he proceeds over the switch points whether they are properly aligned for the movement (R. 233). This rule is number 1188 of plaintiff's Exhibit 9 (R. 234-235), and is as follows, to wit:

“When approaching switches, the engine man must know that they are in proper position”.

It was the engineer's duty to obey the rule (R. 235).

Kitchen was the first one to Dever and Dever said “Look at that switch, the doggone thing hurt me” (R. 245). When an engineer runs through a switch he is disciplined (R. 246).

Sometimes from long wear, the flanges of wheels become thin and the tread cupped and they are taken to the roundhouse and turned down (R. 247).

Kitchen further testified it was his duty to see whether or not the switches were properly set (R. 235) and there was nothing to prevent him seeing how the switch was

aligned as the fireman is required to watch the crossing and they were moving toward the First Street crossing (R. 236) and in order to see down to the First Street crossing, it was necessary to look right over the switch points in question (R. 237). After a most searching cross-examination (R. 235-244), the most that the fireman would admit as to whether or not he saw or could have seen the switch points as the engine approached them, was that he couldn't see them from the position he was in (R. 244).

J. L. Stiles, fieldman, had worked for the defendant at Fort Scott for 48 years (R. 247), 25 of which were as a switchman (R. 248). He testified that when a switch is set improperly for a movement, the ball would go over to the east (R. 251), and when it was properly set, the ball would lay to the east (R. 250). The plate which fastens the lever to the head block or tie and the spikes holding it down were pulled to the west. There were 4 spikes in it (R. 255, 257). In other words, they were pulled over toward the tracks and the witness is sure that is correct. If the train got on the switch points and they slid to the west it might pull the switch plate to the west (R. 257). During the course of this witness' examination, it was admitted by counsel, out of the presence of the jury, that the switch stand had been removed (R. 259-260). Witness Stiles further testified that the headlight on the tender would illuminate the switch points easily, to determine whether or not they were open, from a distance of 75 feet to the north thereof, and he thought the headlight would sufficiently illuminate them from a distance of 200 feet. That from the cab looking toward the rear, the switch points could be seen when the tender was distant therefrom a space of 30 or 40 feet (R. 260-261).

C. E. Johnson was the engineer of the switch engine at the time Dever was injured and had been in the employ

of the company at Fort Scott for 33 years (R. 262). The Brockett switch track starts about 150 feet from the Drake spur and is on a curve practically all of the way until the Drake spur is reached; that he could not see the switch points before they moved over them because a car on the Drake spur interfered with his vision (R. 264, 268). As soon as he knew Dever was hurt, he went to him and Dever told him the switch stand lever had hit him (R. 265). He had passed over the switch numerous times in the last 33 years (R. 269); that if the switch was set properly for the movement, the lever could not flop toward the west (R. 269). He doesn't know whether Dever got off the footboard or fell off the footboard, but he saw him fall (R. 271); that from his position in the cab of the engine he could look over the back of the tender and see the ground 25 feet from the tender (R. 273). He had 30 feet in which to determine whether the switch points were open and never looked to see whether or not they were open (R. 263). He testified he didn't think that rule 1188 admits of any exception and the railroad company penalized him when he violated the rule (R. 274). He was not penalized for running through the switch on this occasion and if the switch was aligned for the movement being made, it would be most unusual for it to fly over and strike Mr. Dever; that he had run through switches before (R. 275) previous to Dever's injury. There had been a bulletin out forbidding switchmen riding upon the footboard in the direction the engine was going and at the time Dever was injured there was a bulletin out permitting one man to ride on the footboard in the direction the engine was moving (R. 277).

Paul McCrum was employed by defendant as an engineer at the time Dever was injured (R. 277) and was present when the tests were made the day following his injury (R. 278-279). He testified it was his duty in backing over switch points to see that they were properly aligned and

that it was the positive duty of all engineers on the Frisco so to do (R. 280); that it was nothing unusual to run through a switch improperly aligned (R. 281).

P. L. Swearingen testified he was general yardmaster of the defendant at the time Dever was injured (R. 283); that they made tests the next day to determine the cause of his injury (R. 283-284); that no spikes were pulled from the plate while making the tests (R. 287); that when they properly lined the switch and went over it with the engine after the spikes holding the plates had been pulled the whole thing was pulled to the west (R. 287-288), and from 3 to 5 days thereafter respondent placed a chain on the switch (R. 288-289), but that on the day the tests were made, there was no chain on the switch and the witness' attention was called to plaintiff's Exhibit 2 (a picture furnished by the defendant (R. 26, 27)), and finally when pressed he said: "I don't know if it is a chain" (R. 289) and on page 290 said "I don't think it is a chain"; that if the switch was set against a movement to the Brockett plant when the tender got up near the switch, the ball would flop to the east and that he did not see how it could have hit Dever (R. 291); that when an engine runs through a switch it will "jim" the switch points (R. 290); that the points on this switch were not "jimmied"; that the switch point remained right up against the west rail when the lever was nearly half way over (R. 291); that 20 or 30 years ago they used to run through switches, but that every switch they have today (December 13, 1937) has a dog on it, and "if that switch would have been laying there fixed to a dog, there would be no way to let loose and come over because those dogs will hold it"; that they have dogs on the switches to keep them from flopping up and hitting a fellow (R. 295).

There was a loss of the joint between the astragalus and the scaphoid bone with exostosis of bony growth ex-

tending out on the forward part of these bones resulting in a permanent disability for which there could be no relief (R. 76, 77, 78). There was severe dislocation and dissipation of the ankle joint, the movement of which was very limited. It will always be painful and will never improve. Fracture or dislocation of the bones and sometimes an erosion where there is injury to the ankle bone will cause traumatic arthritis (R. 85, 86).

At the risk of repetition and length petitioner has stated the evidence with considerable detail in order that the court may be fully apprised thereof and to show that all of the evidence of which the case in its nature is susceptible was adduced by the plaintiff below and supplemented and strengthened by that of the appellant. A reference to the pleadings and the instructions in the case will demonstrate that both the plaintiff and defendant tried the case upon the theory that the doctrine of *res ipsa loquitur* applied. The defendant requested 21 instructions, 13 of which were given and 9 of which were refused, and an inspection of these instructions shows not only that the defendant did not offer a single instruction based upon the theory that the doctrine did not apply but given instructions "J" (R. 308), "M" (R. 309) and "O" (R. 310) and refused instructions "E-1," "L-1," "M-1," "M-2," (R. 312) "O-1," "P," "Q" (R. 313) and "R" (R. 314) requested by the defendant show that it tried and submitted the case upon the theory that the doctrine applied.

IV

Assignments of Error

1. The court erred in holding that the evidence was insufficient to support a verdict for petitioner under the Federal Employers' Liability Act.

2. The court erred in holding that petitioner was not entitled to have a jury determine the liability under the facts of this case and under the Federal Employers' Liability Act.

3. The court erred in holding that petitioner did not have the right to have a jury determine the credibility of the witnesses under the Federal Employers' Liability Act and in this case.

4. The court erred in refusing to apply the Federal Employers' Liability Act uniformly throughout the state of Missouri.

5. The court erred in distinguishing between litigants in the same jurisdiction.

6. The court erred in assuming to take judicial notice that if the switch was properly set for the movement, the lever and ball could not have been thrown towards the west while the engine was moving over it.

7. The court erred in ignoring or failing to give effect to competent and relevant evidence bearing upon the questions presented.

8. The court erred in not affirming the order of the trial court and remanding the cause even though petitioner did not make a case under the *res ipsa loquitur* theory because the opinion conceded that if Dever was not injured in the manner he thought he was then he was injured by "some negligence on the part of the crew."

Summary of the Argument

1. The *res ipsa loquitur* doctrine applies in all its fullness to Federal Employer Liability Cases as construed by this court, the Circuit Court of Appeals, the various state courts,

and particularly the Supreme Court of Missouri. *Minneapolis & St. Louis Railway Co. v. Gotschall*, 130 Minn. 33, 153 N. W. 120, Aff. 244 U. S. 66, 67, 37 S. Ct. 598, 61 L. Ed. 955; *Southern Railway Co. v. Benton*, 98 S. Car. 42, 79 S. E. 710, aff. 233 U. S. 80, 86, 34 S. Ct. 566, 567, 58 L. Ed. 860; *San Juan Light Co. v. Requina*, 224 U. S. 89, 98, 32 S. Ct. 99, 401, 56 L. Ed. 680; *C. & O. Railway Co. v. Vigor*, 101 Fed. 2d 865 (C. C. A. 7, 1939), cert. den. 307 U. S. 365, 83 L. Ed. 1517, 59 S. Ct. 1031; *Pitcairn v. Perry*, 122 Fed. 2d 881 (C. C. A. 8, 1941), cert. den. 314 U. S. 697, 62 S. Ct. 414, 86 L. Ed. 315; *Nashville & St. Louis Railway Co. v. York*, 127 Fed. 2d, 606 (C. C. A. 6, 1942); *Ecker v. Pettibone*, 110 Fed. 2d 451 (C. C. A. 7, 1940); *Ramsouer v. Midland Valley Railroad Co.*, 135 Fed. 2d 101 (C. C. A. 8, 1942); *Terminal Railroad Association of St. Louis v. Staengel*, 122 Fed. 2d 268 (C. C. A. 8, 1941); *Benton, Administrator, v. St. L.-S. F. Railway Co.*, 182 S. W. 61 (S. Ct. of Mo.) (This case); *Cantley v. M-K-E. Railroad Co.*, 183 S. W. 2d 123 (S. Ct. of Mo., not yet officially reported); *Williams v. St. L.-S. F. Railway Co.*, 337 Mo. 667, 85 S. W. 2d 624; *Noce v. St. L.-S. F. Railway Co.*, 337 Mo. 689 (85 S. W. 2d 637).

2. It is only where the facts are such that from them all reasonable men would draw the same conclusion, that questions of negligence cease to be "questions of fact" and become questions of law for the court. Otherwise, such questions are for the jury. *Grand Trunk Railway Co. v. Ives*, 144 U. S. 408, 417, 12 S. Ct. 679, 36 L. Ed. 485; *Tiller v. Atlantic Coast Line Railway Co.*, 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610; *Bailey v. Central Vermont Railway, Inc.*, 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444; *Brady v. Southern Railway Co.*, 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 189; *Tennant v. Peoria & P. U. Railway Co.*, 320 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 322; *Seago v. New York Central R. R.*

Co., 348 Mo. 161, 155 S. W. (2) 126. Reversed without opinion 315 U. S. 806; 62 S. Ct. 806.

3. It was the function of the jury to weigh contradictory evidence, determine the inferences, judge the credibility of the witnesses and draw ultimate conclusions as to the facts.

Tennant v. Peoria & P. U. Railway Co., 320 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 322;

Tiller v. A. C. L., 318 U. S. 54, 63 S. Ct. 444, 87 L. Ed. 610;

Bailey v. Central Vermont Railway, Inc., 319 U. S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444;

Gunning v. Cooley, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720;

Chesapeake & Ohio Railroad Co. v. Martin, 283 U. S. 209, 51 S. Ct. 453, 75 L. Ed. 983;

Myers v. Pittsburg Coal Co., 233 U. S. 184, 1 c. 192, 193, 34 S. Ct. 559, 58 L. Ed. 906;

Baltimore & Ohio Railroad Co. v. Croeger, 266 U. S. 521, 524, 527, 45 S. Ct. 169, 69 L. Ed. 419;

Choctaw O. & G. R. Co. v. McDade, 191 U. S. 64, 24 S. Ct. 24, 48 L. Ed. 96;

Western & Atlanta Railroad Co. v. Hughes, 278 U. S. 496, 49 S. Ct. 231, 73 L. Ed. 473;

Gleeson v. Virginia Railroad Co., 140 U. S. 435, 444, 11 S. Ct. 859, 862, 35 L. Ed. 458.

4. The purpose of the Federal Employers' Liability Act was to establish uniformity of decision and similar treatment to all railroads and their employees throughout the United States, subject to the provisions of the act, and the Supreme Court of Missouri had failed to apply the act uniformly by denying liability in the present case upon

similar or identical evidence it held established liability in another case.

Brady v. Southern Railway Company, 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 189.

St. Louis, etc., Railway Co. v. Steel, 129 Ark. 520, 197 S. W. 288;

McAdow v. K. C. Western Railway Co., 192 Mo. App. 540, 164 S. W. 188, aff., 240 U. S. 51, 36 S. Ct. 252, 60 L. Ed. 520.

Freeman v. Terminal Railway Ass. of St. Louis, 341 Mo. 288, 107 S. W. 2d 36.

5. All of the evidence indisputably established that the switch was properly set for the movement but the court ignored or failed to give effect to the competent and relevant evidence adduced to that effect, and placed the burden upon the plaintiff of offering an explanation of how he got hurt thereby destroying the very reasons for the existence of the *res ipsa loquitur* doctrine, to wit: that plaintiff could name no specific negligence of the defendant and hence was required to rely upon the doctrine.

However, this Court on certiorari, is not confined to a consideration of the evidence stated by the Supreme Court of Missouri in its opinion, but will review the entire record and determine for itself the sufficiency of the evidence and whether petitioner was denied a federal right by the opinion and judgment below.

Brady v. Southern Railway Co., 320 U. S. 476, 64 S. Ct. 232, 88 L. Ed. 189.

Tennant v. Peoria & T. U. Railway Co., 320 U. S. 29, 64 S. Ct. 409, 88 L. Ed. 322.

Owens v. Union Pacific Railroad Co., 319 U. S. 715, 63 S. Ct. 1271, 87 L. Ed. 1683.

Jenkins v. Kurn, 313 U. S. 256, 61 S. Ct. 934, 85 L. Ed. 1116.

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San Juan Light & Transit Co. v. Requena, 224 U. S. 89, 99, 32 S. Ct. 401, 56 L. Ed. 680, 684.

Terminal Railroad Ass. of St. Louis v. Staengel, 122 Fed. 2d 268, 1. c. 275.

Chicago Great Western R. Co. v. Rambo, 298 U. S. 99, 56 S. Ct. 693, 80 L. Ed. 1066.

Argument

It is not only admitted herein that the case was brought, tried and decided upon the *res ipsa loquitur* theory but all of the evidence conclusively establishes that it was one to which the doctrine was properly applicable. No two *res ipsa loquitur* cases are alike and hence it is practically impossible to cite cases similar in all of their details as authority and where the doctrine applies the question as to whether or not the case should be submitted to a jury is one to be determined upon the facts in each case.

Gray v. B. & O. Railroad Co., 24 Fed. 2d 671.

The rule is that the question of negligence under the doctrine is generally for the jury and only by an appraisal and consideration of the facts in evidence in each particular case can the application of the doctrine be determined.

Grand Trunk Railway Co. v. Ives, 144 U. S. 408, 417, 12 S. Ct. 679, 683, 36 S. Ct. 485.

May Department Store v. Bell, 61 Fed. 2d 831 (C.C.A. 8, 1932).

Under the Federal Employers' Liability Act respondent was liable for injury to decedent.

"* * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier or by reason of any defect or insufficiency due to its negligence, in its * * * machinery, tracks, roadbed, work * * * or other equipment."

Liability under the act is to be fixed by the common law as interpreted by the Supreme Court of the United States. That law embraces the *res ipsa loquitur* doctrine and consequently applies to the interpretation and construction of the act as shown by the cases cited in our summary of argument. (Here appropriate quotations may be made.)

The opinion of the Supreme Court of Missouri practically admits that Dever's injuries resulted from negligence, on the part of the crew in "running the switch". Yet despite the statutes reversed the case and ordered a judgment entered for the respondent "because Dever's claim for damages was based wholly upon the theory that the switch was properly set for the movement." The court, therefore, decided that Dever was injured because the respondent's crew was guilty of negligence in "running a switch" although all the evidence of both Dever and the other members of the train crew except the conclusions of some experts was to the effect that the switch was not "run". If the respondent was so convinced that the running of the switch had caused Dever's injuries why were the numerous tests made by it to determine the cause (R. 121, 191, 199, 201, 202, 283)? These alleged tests were made by "running through the switch" when it was set against the movement and when it was set for the movement (R. 171, 172, 200, 202). When they made these tests with the switch set against the movement it just caused the ball and lever to "flop" over toward the east (R. 166, 199) and when they ran over the switch when it was set for the movement it had no effect on it (R. 202), yet despite all of this testimony of the respondent to the effect that the switch was in good working order, respondent's general yardmaster testified they put a chain on the switch from three to five days after Dever was injured (R. 288, 289) and Freeze, the track foreman (R. 177), testified they replaced the switch sometime within two or three days thereafter and that the headblock

was a little decayed (R. 209) and defendant admitted in open court that they removed the switch after Dever was injured (R. 259). The removed switch stand was not produced or offered in evidence by the respondent. Freeze testified that the ground throw switch in question was the only one in his 34 years of experience from which he found the spike had been pulled (R. 208); that there was no lock or latch on the switch and that the weight of the ball was supposed to hold it down (R. 209). Freeze was track foreman and further testified that the switch points were supposed to be a little higher than the adjacent rail against which it rested (R. 182, 183). Yet the particular switch point herein would raise sometimes one inch above the adjacent rail and sometimes fall one inch below the adjacent rail when pressure was on the points (R. 32-34). Furthermore the general yardmaster, Swearingen, testified on direct examination that in making the test following Dever's injuries they pulled all of the spikes from the plate, set the switch for proper movement over it and that when the engine passed thereover the whole thing was pulled over to the west (R. 287). Thus it is seen that the defendant's own testimony completely refutes the finding of the Supreme Court of Missouri that:

"If the switch was properly set for a movement south on the Brocket spur which would be as plaintiff's Exhibit 7 illustrates, then the switch lever and ball could not have been thrown the west while the engine was moving over the switch."

182 S. W. 2d l. c. 63, because if the flange of the wheel was pressing against the switch point toward the east with such force that it maintained the point in its proper position then under the learned commissioner's theory, the switch point could not have moved toward the west, whether it was attached to the switch stand or not because the flange

of the wheel was pressing against the west side of the east switch point. But under Swearingen's testimony when the tests were made and the spikes pulled and the lever and points properly aligned for the movement, when the engine got on the switch point, it pulled everything toward the west (R. 287-288). This is the testimony of an eyewitness to the test produced by the respondent and testifying upon direct examination. This is exactly what happened when Dever was injured with the exception that the plate was spiked down at that time and the weight of the engine was so great pulling to the west that it pulled the lever and ball up and over until it struck Dever and the footboard and could go no farther. Whereupon, to relieve unexhausted pressure still being exerted by the switch point pulling on the lever, the switch plate was torn up. The fact that the flange on the west wheel was between the west switch point and the west rail would have no significance as the gauge of the switch point was $5\frac{1}{2}$ inches less than the gauge of the rails between which they moved and operated (R. 73, 207). The thickness of the flange was only $1\frac{1}{4}$ inches (R. 73) which would permit the switch points to move 4 and $\frac{1}{4}$ inches to the west before the west switch point would contact the flange of the west wheel and its movement stopped. Therefore, inasmuch as the whole throw of the lever at the point of its connection with the connecting rod which ran therefrom to the switch point was only $5\frac{1}{2}$ inches, (the total movement of the switch point back and forth between the rails) and as the points could therefore move four and $\frac{1}{4}$ inches before being arrested in their movement by the flange of the west wheel a pull on the lever could be exerted causing the ball and lever to move nearly $\frac{1}{3}$ of the distance of the arc of 180 degrees described by them in being thrown from the east to the west and as the overhang of the footboard east of the east rail

was 22 inches, it is easily seen how Dever could have been injured by this most unusual and extraordinary movement of the switch lever and ball and completely destroyed the theory of the learned commissioner of the Missouri Supreme Court expressed in the opinion as the ball and lever, when thrown toward the track, would lay within about 6 inches of the east rail thereof and the footboard overhanging the east rail 22 inches (R. 212).

There are several theories which could account for the unusual and extraordinary operation of the switch in question and its controls at the time Dever was injured, among which are the following:

Decedent testified that the plate was pulled upon the side away from the track (R. 33), which could only be accomplished by a pull to the west and in this he was corroborated by brakeman Stiles (R. 255-257). It therefore must be admitted that if the switch stand was pulled up, and toward the west, that some physical force must have been applied in that direction and as the stand was connected with the switch points only, such force could only be applied from the switch points, that would be sufficient to pull up the plate, and this might readily have been accomplished in view of the testimony that the tie to which the plate was attached was somewhat decayed (R. 209). If, on the other hand, the plate was pulled up prior to the time decedent was injured, then in view of the looseness of the connection, the gauge of the track, the fact that the points slid back and forth easily on the sloping, greased tie or switch plate, that there was $4\frac{1}{2}$ to $5\frac{1}{2}$ inches difference between the gauge of the switch points and the gauge of the track; that the wheels of the cars were $4\frac{1}{2}$ to 5 inches across the tread (R. 33-36, 73) and the ball of the rail only $2\frac{1}{2}$ or 3 inches (R. 127) across; that the switch points

would become depressed as much as one*inch below the adjacent rail (R. 34), all would tend to cause the switch points to move to the west for the following reasons:

The inside gauge of the wheels is the same as the gauge of the track, of which fact court takes judicial notice, and the wheels of the tender would overhang the rail or switch points' surfaces (providing they were standard gauge) at the north end and on the east side at least $1\frac{1}{2}$ inches, being the difference between the tread of the wheel and the width of the rail at its widest place, but as the wheel would advance to the south on the east switch point, the overhang would become greater because the switch points narrowed to a fine point as they approached the adjacent rail against which they would lay (see exhibits 7, K and L (R. 26-27, 193-195)) and if a switch point was depressed by the weight of the tender until it was one inch below the stock rail upon which no weight would rest until the wheel of the tender reached it, then the outside, or east edge of rim of the wheel would strike the inside of the east stock rail (east track of the Drake spur) several feet north of the extreme south end of the switch point an inch below the top of the adjacent rail (R. 34) which would cause thousands of pounds of pressure between the wheels and the channel or west side of the east rail and as a consequence thereof, the east rail would have to give or the wheel would have to give (R. —) and as nothing was found wrong with the east rail, as the wheels of the tender were not permanently fixed and as the switch points were movable, it stands to reason that the east wheel of the tender was pushed or slid to the west as it advanced southward. Consequently pressure would be applied toward the west, and as the wheel was on the switch point, such pressure would be communicated by the friction of the wheel and the weight of the tender upon both of the switch points (com-

municated through the tie rod connecting the East switch point to the west switch point) and this would be sufficient to move the points and the wheels of the tender to the west until the flange of the west wheel made contact with the channel or east side of the west rail, which would then cause the east wheel of the tender to override and mount the east rail and this would be particularly true if the treads of the wheels of the tender were worn and cupped and in this particular case, after the wheels had passed the south end of the switch points, they would then spring back to the east side because they were only attached at their north end and the lever and ball, not having been permitted to fall to the position they would ordinarily be in, with the switch points to the west, by reason of having struck decent, would fall back after the east wheel had mounted the east rail because after that took place, there would be no weight or pressure at all upon the east switch point and as stated in the evidence, the switch points could move any direction. The weight of the tender would be wholly upon the stock rail adjacent to the switch points and in addition thereto, the flange of the following wheel going between the west switch point and the west rail would tend to force the switch points to the east at least for the distance of the width of the flange, or $1\frac{1}{4}$ to $1\frac{1}{2}$ inches. However, there is no evidence in the record as to the position of the switch points or the ball and lever after the engine and tender had stopped. It will, therefore, be seen by this hypothesis that the east wheel, instead of pressing against the east switch point, as claimed by the defendant, and as set forth in the opinion, would in reality be on the east switch point and pressing against the east rail toward the east until it mounted it and the tread of the wheel would be pressing against the switch point toward the west. It appears to the writer that this hypothesis is un-

answerable and such conclusion is powerfully aided by the testimony of the general yardmaster, Swearingen, (R. 287-288) as follows, to wit:

"A. I will say to you that there was no spike pulled from that plate while we were making that test, not up until this time. Later on they pulled the spikes from that plate, lined the switch over there and drug the plate with it.

"A. You say lined the switch over there, you mean they ran through the switch wrong? A. No, you are asking about the plate?

"Q. Yes, sir. A. All right, the spikes now, you understand, were pulled out of this plate here. When we went through there, instead of throwing the ball over it just pulled the whole thing, this part of this, over to the west.

"Q. Then did you go through the switch with the switch set right and with the spikes out? A. Yes."

This testimony was brought out on direct examination of the witness by the defendant, who stopped *right there*. This testimony absolutely destroys the theory that the east wheel exerted pressure against the east switch point and thereby prevented the ball and lever from being thrown to the west, because the whole assembly actually was pulled to the west according to Swearingen and if it would pull the assembly west when it was not spiked down, such fact is evidence that there was no pressure against the east switch point by the flange of the east wheel, otherwise, the plate, lever and ball could not have been dragged west, but would have had pressure exerted against them toward the east.

However, this is not the only hypothesis that suggests itself as to how the accident could have happened, because even if neither of the switch points did not become depressed from time to time below the level of the adjacent rail against which they lay, they could have been moved to

the west by the tender passing over them. The evidence shows that while the standard gauge of a track is 4 feet $8\frac{1}{2}$ inches, yet the gauge of the switch points was $5\frac{1}{2}$ inches less than the gauge of the track, and this would be true regardless of the gauge of the track, because the throw of the lever was $5\frac{1}{2}$ inches and without considering the looseness of the connection, the gauge of the points would have to be $5\frac{1}{2}$ inches less than the gauge of the track because they move and play for a distance of $5\frac{1}{2}$ inches within the gauge of the track and as the flange of the wheel was $1\frac{1}{2}$ inches thick, then even with the flange of the wheel between the west rail and the west switch point, the switch points could still be moved back and forth for a distance of 4 inches between the rail and the flange of the west wheel at any point opposite the place where the distance was shortest between the west switch point and the west rail. The evidence of defendant's witnesses shows there was $1\frac{1}{2}$ inches of play in the lever before it would move the switch point (R. 206) (whether the witness meant that the lever would have to be raised $1\frac{1}{2}$ inches without moving the switch points or that the switch points could be moved $1\frac{1}{2}$ inches without moving the lever is not clear) and assuming that the witness meant the points could be moved $1\frac{1}{2}$ inches without the lever being moved (which is taking the view most unfavorable to respondent), this would leave $2\frac{1}{2}$ inches that the switch points could be moved to the west, exerting pressure in that direction against the lever, and pull through the connecting rod before it would strike the flange on the west wheel. This is half the throw distance of the lever and would raise the lever and ball at least 90° or to a perpendicular position and the momentum with the weight of the tender on the switch points would be sufficient to cause the lever and ball to move clear over and strike decedent. It will, therefore, be seen that even if the east switch point was higher than the ad-

jacent east rail with the weight of the tender upon it, nothing to hold the lever down and the tender being inclined to move from side to side, there would be a tendency to pull the switch point to the west and consequently the lever and ball and this would be accentuated if the connecting rod were bent because that would shorten it and tend to eliminate the $1\frac{1}{2}$ inches of play in the lever, before it would start to move the points and throw it over toward the west before the point would stop against the flange of the west wheel.

Another theory could account for the movement of the switch points and ball. The court will take judicial notice that the gauge of the wheels is the same as the track namely 4 feet $8\frac{1}{2}$ inches from inside to inside of flange. The evidence showed that the tread of the wheels was $4\frac{1}{2}$ inches. Therefore the distance from outside tread to outside tread of any opposite wheels would be 5 feet $5\frac{1}{2}$ inches (4 feet $8\frac{1}{2}$ inches plus $4\frac{1}{2}$ inches for each wheel) and allowing 1 inch on each wheel for sufficient bearing surface upon the rail, or 2 inches altogether, there would be 7 inches that the track could be out of gauge and the wheels still remain thereon and 7 inches in which the wheels could play back and forth between the rails. Toner testified that there was quite a bit of motion to switch engines on industrial tracks which is probably caused by the play of the wheels back and forth between the rails and on the rails (R. 158, 159). There are two pairs of trucks under a tank or tender or four wheels on each side (R. 58). If, therefore, there was lateral motion of the tender, it was caused by the wheels moving from side to side between and on the rails on account of the track being out of gauge and if it was off gauge, then the rear wheel on the west side of the truck might hit the heel of the west switch point, as it was higher than the adjacent rail, and cause the front

wheel on the east side of the truck to pull toward the west and pull the east point, ball and lever with it. In fact, this is what decedent testified did happen (R. 64).

Other probabilities might suggest themselves to the learned court and in this connection it might not be amiss to call to the court's attention some other factors. For instance, all of the evidence showed that the sole purpose in having the ball upon the lever was to prevent its raising up. If, then, that was its sole purpose, in what position should it be for the ball to accomplish this purpose? Certainly, not when it would be laying to the west because all of the testimony showed that by running through the switch the ball would raise up and go over, and if, as suggested by counsel in its brief, and followed by the learned Commissioner in his opinion, the pressure of the flange of the wheel against the rail would prevent the lever and the ball from being pulled over to the west, then the ball accomplished no purpose at all, and was a useless instrumentality. But the testimony also showed that the purpose of the ball was to counteract the weight of the engine and cars. That must mean to counteract their weight when they were on a switch point because it was not the weight of the engine or cars which moved the lever to the east when the switch was run through, but the position of the flange of the west wheel between the west switch point and the west rail. Therefore, the purpose of the ball was to prevent the movement of the point and the lever when an engine or car was passing over the switch and not when running "through" it and such function was thereby recognized by the defendant—that cars and engines on a switch point had a tendency to cause the same to move. Further, the evidence showed the connecting rod was bent. This would naturally shorten it and if it had previously been tight and in first class condition, the bending and shortening would prevent the ball from

going clear down and resting on the head block when the points would be toward the east and as shown by plaintiff's exhibit 2 (R. 26-27). When the ball is resting on the head block to the east, it is past dead center, and any pull exerted to the west would merely pull it down tighter against the head block, whereas, if the connecting rod was so shortened and bent that the east switch point touched the east rail before the lever was thrown past dead center, then there would be nothing interposed between the lever and its movement up and to the west. Also, by reference to exhibit 2 (R. 26, 27) and K (R. 194, 195) it will be seen that each track is braced at every tie opposite the switch points, which would hold it rigid against any pressure from a wheel against the channel or west side of the east rail, whereas, the switch point was loose and only connected to the other switch point and at its north end with an adjacent rail (loosely). This is what Freeze referred to in his testimony (R. 183) when he said that the switch points were supposed to be higher than the adjacent rail otherwise the pressure of the wheel would catch the rail and turn it over.

Petitioner, therefore, does not see anything so improbable, impossible, extraordinary, uncommon or contrary to physical facts as to be unbelievable or rather so unbelievable as to render decedent's testimony and that of the other witnesses in the case unbelievable and thereby prevent the application of the *res ipsa loquitur* doctrine to the facts proven.

The opinion of the Supreme Court of Missouri states (R. 337):

"If the switch was improperly lined for a south movement on the Brockett spur then a movement of the engine south through the switch would have had a tendency to throw the ball and lever from west to east. If that happened the occurrence was not due to a mechan-

ical defect, but to some negligence on part of the crew in "running a switch," which we understand in railroad parlance means, going through a switch not properly aligned for the movement made."

182 S. W. 2d 61, l. c. 63 as follows to-wit.

By this statement the court conceded therewith sufficient evidence to go to the jury upon the question of the engine crew "running through the switch" and this negligence is accentuated by the evidence of the defendant of rule No. 1188 as follows, to-wit:

"When approaching switches the enginemen must know that they are in proper position (R. 235)."

This rule prohibits running through a switch, permits of no exception, and enginemen are penalized when it is violated (R. 274). The enginemen were not penalized in this case (R. 275) and in view of section 1 of the Federal Accident Reports Act, 36 Statutes 350, Section 38, Title 45, Chapter 1, 1935 Addition, Code of Laws of the United States it is the duty of the executive officer of every common carrier engaged in Interstate Commerce to make a monthly report of all accidents resulting in injuries to persons and a penalty is prescribed for their failure so to do. It will therefore, be presumed that the respondent obeyed the law and that a thorough investigation was made for the purpose of ascertaining the cause of this disaster and respondent undoubtedly knows that the switch had not been "run through" otherwise the enginemen would have been penalized. In fact, the evidence is conclusive that they did make an investigation and made tests of this very switch subsequent to Dever's injury.

However if the engineman had run through the switch in violation of the rule and Dever been injured as a result thereof then there is no doubt that the action of the trial

court in granting a new trial was proper, even though there was no evidence to sustain a judgment under the *res ipsa loquitur* doctrine because the practice in the courts of Missouri in such a case is as set forth in the case of *Smith v. Terminal Railroad Association of St. Louis*, 160 S. W. 2d 476 (not reported in the state reports) l. c. 479 as follows to-wit:

“The furtherance of justice requires that a case should not be reversed without remanding unless the appellate court is convinced that the facts are such that a recovery cannot be had; and *even though the plaintiff fails to substantiate the theory upon which his case was tried*, if he nevertheless shows a state of facts which *might* entitle him to recover if his case were brought upon a proper theory the judgment will not be reversed outright, but instead, in the exercise of a sound judicial discretion, the case will be remanded to give him the opportunity to amend his petition, if so advised, so as to state a case upon the theory which his evidence discloses. *Rutledge v. Missouri Pac. Ry. Co.*, 123 Mo. 121, 24 S. W. 1053, 27 S. W. 327; *Woodson v. Metropolitan Street R. Co.*, 224 Mo. 685, 123 S. W. 820, 30 L. R. A., N. S., 931, 20 Ann. Cas. 1039; *Chandler v. Chicago & A. R. Co.*, 251 Mo. 592, 158 S. W. 35; *Patzman v. Howey*, 340 Mo. 11, 100 S. W. 2d 851; *Scott v. Davis*, 216 Mo. App. 530, 270 S. W. 433; *Anderson v. Wells*, 220 Mo. App. 19, 273 S. W. 233; *Neeper v. Heinbach*, Mo. App., 249 S. W. 440.” (Emphasis ours.)

In view of this state of the law the action of the Supreme Court of Missouri in denying a new trial to plaintiff is not understandable.

Conclusion

It is respectfully submitted that the decision of the Supreme Court of Missouri should be reversed.

Respectfully submitted,

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